CIMB INVESTMENT BANK BHD

v.

METROPLEX HOLDINGS SDN BHD

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN CJ (MALAYA)
ABDULL HAMID EMBONG FCJ
AHMAD MAAROP FCJ
ZALEHA ZAHARI FCJ
JEFFREY TAN FCJ
[CIVIL APPEAL NO: 02(i)-03-01-2013(W)]
4 NOVEMBER 2014

CIVIL PROCEDURE: *Judgments and orders - Validity of - Order for sale - Whether a final order - Whether collateral proceedings may be commenced to attack validity of order for sale - Whether contravened substantive statutory prohibition*

CIVIL PROCEDURE: *Res judicata - Charge action - Failure to raise issues pertaining cause to contrary in charge action - Whether collateral proceedings to show cause to contrary barred by doctrine of res judicata*

LAND LAW: *Charge - Charge action - Cause to contrary - Whether issues pertaining cause to contrary can only be raised in charge action - Whether chargor may bring collateral proceedings to show cause to contrary*

LAND LAW: *Charge - Order for sale - Validity of - Foreign guarantor - Failure to obtain approval of State Authority - Whether violated s. 433B National Land Code - Whether charge valid - Whether order for sale contravenes substantive statutory prohibition - Whether collateral attack on validity of order for sale should be allowed*

The respondent, a wholly owned subsidiary of Metroplex Bhd, was the registered proprietor of a piece of property known as Putra Place. The respondent had created a third party charge over Putra Place in favour of Bank Bumiputra Malaysia Bhd ('BBMB') as security agent for a syndicate of banks, in consideration of credit facilities granted to Metroplex Bhd. Subsequently, the charge was transferred to Commerce International Merchant Bank ('CIMB', as the appellant was formerly known) who had assumed the role of security agent. Metroplex Bhd defaulted on the loan and CIMB filed a charge action against the respondent, pursuant

to s. 256 of the National Land Code ('NLC'). The charge action was resisted by the respondent. The High Court granted order for sale of the Putra Place by public auction. The respondent's appeal was dismissed by the Court of Appeal. Putra Place was then purchased by OSK Trustee Bhd in the public auction. Before the auction, the respondent filed the present action seeking declarations, *inter alia*, to the effect that: (i) the charge was not indefeasible within the meaning of s. 340(2) of the NLC; (ii) the charge was null and void; (iii) the charge, the instrument and the memorial were invalid; and (iv) the order for sale be set aside. The appellant applied to strike out the action pursuant to O. 18 r. 19 of the Rules of the High Court 1980. The High Court held that: (i) the instant action was founded on an alleged fact that the charge was defective and this should have been raised in the charge action; and (ii) the issue of limitation which was raised by the appellant but not replied to by the respondent who filed no affidavit to oppose the instant striking out application, was deemed admitted by the respondent. The High Court thus concluded that the instant action was barred by the doctrine of *res judicata* and by limitation. The Court of Appeal however allowed the respondent's appeal and held that there were two strong grounds to impugn the charge, namely: (a) BBMB had no power to appoint the appellant as the security agent because such a power was vested in the guarantee facility agreement ('GFA') as stipulated in cl. 18(G) of the GFA; and (b) the charge violated s. 433B of the NLC in that six of the guarantors under the GFA were foreign companies which failed to obtain the requisite approval of the State Authority. The appellant was granted leave to appeal to the Federal Court against the order of the Court of Appeal on the following question: whether a chargor was barred from bringing a fresh civil suit against a chargee in order to raise issues which show a 'cause to the contrary' in circumstances where the chargor had not raised any such issues when it opposed the chargee's application to court for order for sale of the charged property under s. 256 of the NLC.

Held (allowing appeal with costs)
Per Jeffrey Tan FCJ delivering the judgment of the court:

(1) Unless the order is a nullity in the sense as enunciated in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd;* dist ('*Badiaddin*'), it could not be attacked in collateral proceedings. The present action was a collateral attack of an

order for sale that was regularly obtained and against which the appeal was dismissed. For a collateral attack to be maintained, the critical particular is not whether there are grounds to impugn the charge but whether the order for sale is a contravention that defies a substantive statutory prohibition. That critical particular was not present in the instant action. (paras 13 & 14)

(2) Where the dealing is a land charge or lien, it shall not be necessary for a non-citizen or a foreign company to obtain the prior approval of the State Authority for the registration and endorsement of the charge. Hence, it could not be contended that the instant charge violated s. 433B in that six of the guarantors under the GFA were foreign companies which failed to obtain the requisite approval of the state authority. Further, the alleged breach of cl. 18(G) of the GFA, which, even if true, was not a contravention that defied an express statutory prohibition. As such, the conditions of *Badiaddin* for a collateral action were not met and the respondent was therefore barred by the doctrine of *res judicata* to bring the action to attack the order for sale. (paras 17 & 18)

(3) Foreclosure proceedings result in the grant or refusal of an order for sale, and not in a judgment or decree. But an order for sale, once granted and unless set aside, is nonetheless, a final order; (*Mui Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener*, refd). (para 27)

(4) The leave question was answered in the affirmative. Issues relating to 'cause to the contrary' could only be raised in the charge action. A chargor is therefore barred from bringing a fresh action against a chargee, in order to raise issues which show a 'cause to the contrary', regardless of whether the chargor had or had not raised such issues at the stage of the chargee's application for an order for sale of the charged property under s. 256 of the NLC. (para 28)

Bahasa Malaysia *Translation Of Headnotes*

Responden, anak syarikat milik penuh Metroplex Bhd, adalah pemilik berdaftar sebuah hartanah yang dikenali sebagai Putra Place. Responden telah membuat gadaian pihak ketiga terhadap Putra Place berpihak kepada Bank Bumitputra Malaysia Bhd ('BBMB') sebagai ejen sekuriti bagi suatu sindiket bank-bank,

sebagai balasan kepada kemudahan kredit yang diberikan kepada Metroplex Bhd. Kemudian, gadaian tersebut dipindahkan kepada Commerce International Merchant Bank ('CIMB', seperti yang perayu dikenali sebelum ini) yang mengambil peranan sebagai ejen sekuriti. Metroplex Bhd gagal membayar pinjaman dan CIMB memfailkan tindakan gadaian terhadap responden, menurut s. 256 Kanun Tanah Negara ('KTN'). Tindakan gadaian tersebut dibantah oleh responden. Mahkamah Tinggi memberikan perintah jualan Putra Place melalui lelongan awam. Rayuan responden ditolak oleh Mahkamah Rayuan. Putra Place kemudiannya dibeli oleh OSK Trustee Bhd dalam lelongan awam. Sebelum lelongan, responden memfailkan tindakan ini memohon deklarasi-deklarasi, antara lain, (i) gadaian tersebut bukan tidak boleh disangkal dalam maksud s. 340(2) KTN; (ii) gadaian tersebut adalah batal dan tidak sah; (iii) gadaian tersebut, instrumen dan memorial tersebut tidak sah; dan (iv) perintah jualan tersebut diketepikan. Perayu memohon untuk membatalkan tindakan tersebut menurut A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Mahkamah Tinggi memutuskan bahawa: (i) tindakan ini diasaskan atas dakwaan fakta bahawa gadaian tersebut cacat dan ini sepatutnya dibangkitkan dalam tindakan gadaian; dan (ii) isu had masa telah dibangkitkan oleh perayu tetapi tidak dijawab oleh responden yang tidak memfailkan afidavit menentang permohonan pembatalan ini, adalah dianggap diterima oleh responden. Mahkamah Tinggi, oleh itu, memutuskan bahawa tindakan ini dihalang oleh doktrin *res judicata* dan had masa. Mahkamah Rayuan, walau bagaimanapun, membenarkan rayuan responden dan memutuskan bahawa terdapat dua alasan kukuh untuk mempersoalkan gadaian tersebut, iaitu: (a) BBMB tidak mempunyai kuasa untuk melantik perayu sebagai ejen sekuriti kerana kuasa sedemikian terletak hak dalam perjanjian kemudahan jaminan ('PKJ') seperti yang termaktub dalam klausa 18(G) PKJ; dan (b) gadaian tersebut melanggar s. 433B KTN di mana enam penjamin di bawah PKJ adalah syarikat asing yang gagal memperoleh kelulusan yang diperlukan daripada Pihak Berkuasa Negeri. Perayu diberikan kebenaran untuk merayu ke Mahkamah Persekutuan terhadap perintah Mahkamah Rayuan atas persoalan berikut: sama ada penggadai dihalang daripada membawa guaman sivil baru terhadap pemegang gadaian untuk membangkitkan isu-isu yang menunjukkan 'sebab bertentangan' dalam hal keadaan di mana penggadai tidak membangkitkan isu-isu sedemikian apabila ia menentang permohonan pemegang gadaian kepada mahkamah untuk perintah jualan hartanah yang digadaikan di bawah s. 256 KTN.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Jeffrey Tan HMP menyampaikan penghakiman mahkamah:

(1) Kecuali perintah tersebut adalah batal seperti yang dinyatakan dalam kes *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd;* dibezakan ('*Badiaddin*'), ia tidak boleh dicabar adalam prosiding kolateral. Tindakan ini adalah cabaran kolateral perintah jualan yang telah diperoleh secara wajar dan terhadap mana rayuan telah pun ditolak. Bagi mengekalkan cabaran kolateral, butir yang kritikal bukan sama ada terdapat alasan untuk mempersoalkan gadaian, tetapi sama ada perintah jualan tersebut adalah bertentangan yang mengingkari larangan statutori substantif. Butir penting tersebut tidak wujud dalam tindakan ini.

(2) Di mana urusniaga adalah gadaian tanah atau lien, tidak perlu bagi seseorang yang bukan-warganegara atau syarikat asing untuk memperoleh kelulusan terdahulu Pihak Berkuasa Negeri bagi pendaftaran atau pengendorsan gadaian tersebut. Oleh itu, tidak boleh dihujahkan bahawa gadaian di sini bercanggah dengan s. 433B di mana enam penjamin di bawah PKJ adalah syarikat-syarikat asing yang gagal memperoleh kelulusan Pihak Berkuasa Negeri yang diperlukan. Tambahan lagi, pelanggaran kl. 18(G) PKJ, yang, walau pun benar, bukan percanggahan yang mengingkari pelanggaran statutori langsung. Oleh itu, syarat-syarat dalam kes *Badiaddin* bagi tindakan kolateral tidak dipenuhi dan responden oleh itu dihalang oleh doktrin *res judicata* untuk membawa tindakan mencabar perintah jualan.

(3) Prosiding perampasan berakhir dalam pemberian atau penafian perintah jualan, dan bukan dalam penghakiman atau dekri. Tetapi sesuatu perintah jualan, sebaik sahaja diberikan dan kecuali diketepikan, walau bagaimanapun, adalah suatu perintah muktamad; (*Mui Bank Bhd v. Cheam Kim Yu (Beh Sai Ming, Intervener*, dirujuk).

(4) Persoalan kebenaran adalah dijawab secara afirmatif. Isu-isu berkaitan 'sebab bertentangan' hanya boleh dibangkitkan dalam tindakan gadaian. Penggadai oleh itu dihalang daripada membawa tindakan baru terhadap pemegang gadaian, untuk membangkitkan isu-isu yang menunjukkan 'sebab bertentangan', tidak mengira sama ada penggadai telah atau tidak

membangkitkan isu-isu tersebut di peringkat permohonan pemegang gadaian bagi perintah jualan hartanah yang telah digadaikan di bawah s. 256 KTN.

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(dist)***

Eu Finance Berhad v. Lim Yoke Foo [1982] 1 LNS 21 FC ***(refd)***

Harkness v. Bell's Asbestos And Engineering Ltd [1967] 2 QB 729 ***(refd)***

Hew Hooi Chun v. KL Teksi Radio Bhd [2010] 4 CLJ 657 CA ***(refd)***

Kandiah Peter Kandiah v. Public Bank Bhd [1993] 4 CLJ 332 SC ***(dist)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(dist)***

Metroplex Holdings Sdn Bhd v. Commerce International Merchant Bankers Bhd [2013] 8 CLJ 329 CA ***(refd)***

Mui Bank Bhd v. Cheam Kim Yu [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222 SC ***(refd)***

Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***

United Malayan Banking Corporation Bhd v. Sykt Perumahan Luas Sdn Bhd [1988] 2 CLJ 522 HC ***(refd)***

Legislation referred to:

National Land Code, ss. 256(3), 340(2), 433B(1)(b), (c), (e), (3), (4)
Rules of the High Court 1980, O. 18 r. 19

Other source(s) referred to:

Teo Keang Soo & Khaw Lake Tee, *Land Law in Malaysia, Cases and Commentary*, 2nd edn, p 694

For the appellant - Tommy Thomas (Alan Adrian Gomez & Rahayu Mumazaini with him); M/s Tommy Thomas

For the respondent - K Kirubakaran (Wong Rhen Yen & Raven Sivanesan with him); M/s Dennis Nik & Wong

Reported by Amutha Suppayah

JUDGMENT

Jeffrey Tan FCJ:

[1] The question upon which leave was granted to appeal against the order of the Court of Appeal in respect of the matter decided by the High Court in the exercise of its original jurisdiction, reads:

> Whether a chargor is barred from bringing a fresh civil suit against a chargee in order to raise issues which show a 'cause to the contrary' in circumstances where the chargor had not raised

any such issues when it opposed the chargee's application to Court for Order for Sale of the charged property under section 256 of the National Land Code.

[2] The background facts are as follows. The respondent, a wholly owned subsidiary of Metroplex Berhad, was the registered proprietor of land held under Geran 10012 Lot 38, Seksyen 51, Bandar Kuala Lumpur (hereinafter referred to as 'Putra Place'). In August 1993, the respondent created a third party charge over Putra Place in favour of Bank Bumiputra Malaysia Berhad ('BBMB') as security agent for a syndicate of banks, in consideration of credit facilities granted by the said syndicate of banks to Metroplex Berhad. On 5 April 2002, the charge was transferred to Commerce International Merchant Bank ('CIMB', as the appellant was formerly known) who had assumed the role of security agent for the said syndicate of banks.

[3] Metroplex Berhad defaulted on the loan. In October 2005, CIMB filed a charge action (Kuala Lumpur High Court S1-24-2394-2005) against the respondent, pursuant to s. 256 of the National Land Code ('NLC'). The charge action was resisted by the respondent. On 16 July 2007, Wahab Patail J, as he then was, ordered the sale of Putra Place by public auction. The respondent appealed, but the appeal was dismissed by the Court of Appeal. Putra Place was put on the auction block. Judicial sale was initially not successful. But on 30 March 2011 (that is, the fourth occasion that it was up for auction), Putra Place was successively sold to OSK Trustee Berhad (as Trustee for Sunway REIT) for RM513,945,000, who was registered as proprietor of Putra Place on 19 April 2011.

[4] Meantime, on 19 May 2009, that is, before auction sale of Putra Place to OSK Trustee Berhad, the respondent filed an action ('the action below') against the appellant for the following reliefs.

(a) a declaration that the charge is not indefeasible within the meaning of s. 340(2) of the National Land Code;

(b) a declaration that the charge is null and void;

(c) a declaration that the charge, the instrument and the memorial are invalid;

A (d) an order that the charge, the instrument and the memorial be set aside;

(e) an order that the order for sale dated 16 July 2007, the auction and other related orders in respect of the land made
B in the Kuala Lumpur High Court OS proceedings (Suit No: S-24-2394-2005) be set aside;

(f) an order that the Registrar of Titles cancel the entries from the register in respect of the charge, the instrument and the memorial;
C

(g) costs; and

(h) such further or other orders as this Honourable Court deems just and fit.

D **[5]** The appellant applied to strike out the action pursuant to O. 18 r. 19 of the Rules of the High Court 1980 (since replaced by the Rules of Court 2012). That was not the first time that the appellant had applied to strike out an action for those said reliefs. The trial court related that in Kuala Lumpur 22-177-2011 ('suit
E 177'), Metroplex Berhad sought reliefs identical to the reliefs sought in the instant action, that the appellant applied to strike out suit 177 on the grounds, *inter alia*, that it was barred by the doctrine of *res judicata* and by limitation, that suit 177 was struck
F out (by the same trial court) on those grounds, and that the appeal against the striking out order was discontinued by Metroplex Berhad on or about 25 February 2011.

[6] As for the instant striking out application, the trial court held (i) that in the charge action, the stand of the respondent was
G just to seek an extension of time to settle its debt which was admitted, and to seek a postponement of the charge action (see paras. 37 and 38 of the judgment of the trial court), (ii) that the instant action was founded on an alleged fact – the charge was defective – that should have been raised in the charge action (see
H paras. 34 and 35 of the judgment of the trial court), and, (iii) that the issue of limitation which was raised by the appellant but not replied thereto by the respondent who filed no affidavit to oppose the instant striking out application, was deemed admitted by the respondent. The trial court concluded that the instant action for
I the said reliefs was barred by the doctrine of *res judicata* and by limitation.

[7] The Court of Appeal tacitly agreed with the trial court that the instant action was founded on the alleged fact that the charge was defective. At para. 11 of its judgment (*Metroplex Holdings Sdn Bhd v. Commerce International Merchant Bankers Bhd* [2013] 8 CLJ 329; [2013] 4 MLJ 520), the Court of Appeal thus summed up the 'stand' of the respondent in the action below:

> [11] The stand of the appellant was rather simple. That the interest purported to have been vested in the respondent by way of the instrument and memorial ('the memorial') is defeasible and ought to be set aside because the registration of the instrument and the memorial was obtained by means of an insufficient or void instrument.

[8] Also, the Court of Appeal thus paraphrased paras. 12 to 17 of the statement of claim which pertained to the assertion that the charge was defective:

> [12] The appellant further averred that:
>
> (a) on the strength of s. 241(4) of the NLC read together with s. 344(1)-(2) of the NLC, no charge may be granted to two or more persons or bodies otherwise than as trustees or representatives and once transferred, the registrar shall so describe it in the memorial of registration;
>
> (b) since BBMB and later the respondent were both the sole chargee and security agent of the guarantors neither BBMB nor the respondent is capable of entering upon the Instrument as trustee;
>
> (c) s. 344 of the NLC envisages the situation where a trustee can be so registered as such where a trust has been formed between the chargee and chargor. And since no such trust has been formed between the appellant and BBMB or the respondent, neither BBMB nor the respondent can be so registered;
>
> (d) the instrument provides that the charge was to secure repayment to the chargee qua lender when in fact it was to secure payment to the chargee qua trustee; and
>
> (e) at any rate, the respondent was neither, in fact or in law, a lender or trustee to the appellant and no repayment was due to it.
>
> [13] The appellant averred that since the respondent did not notify the appellant of the transfer of the charge in writing, it is not liable to the respondent for any amounts claimed or at all.

A [14] It is the contention of the appellant that the respondent was appointed as the security agent in contravention of cl. 18(G) of the [Guarantee Facility Agreement] (GFA) and, consequently, BBMB had no power to transfer the charge to the respondent.

B [15] It is also the contention of the appellant that BBMB appointed the respondent as security agent within 30 days of its notice period as stipulated under cl 18(G) of the GFA, during which time, only the guarantee facility agent was empowered to appoint a security agent. That being the case, the appointment of the respondent was of no effect.

C [16] It is the contention of the appellant that:

(a) BBMB had no power to appoint the respondent as the security agent;

D (b) the transfer of the charge is invalid; and

(c) the memorial is an insufficient or void instrument to register the transfer of the charge.

[17] That the charge is void pursuant to s 433B of the NLC because six of the guarantors under the GFA, namely:

E (a) Banque Internationale A Luxembourg;

(b) Bank of Nova Scotia;

(c) Credit Lyonnais;

F (d) Chiao Tung Bank Co Ltd;

(e) Standard Chartered Bank; and

(f) Overseas Chinese Commercial Banking Corporation

G had failed to secure the state authority's approval for the creation of their purported interest in the land by way of the charge.

[9] As said, the trial court held that all issue of the charge being defective belonged to the charge action and could not be raised H in the instant action. The Court of Appeal disagreed. The Court of Appeal held that the respondent's action "is predicated upon a cause of action that the charge created by the appellant over the land in favour of the respondent is not indefeasible within the meaning of s. 340(2) of the NLC", that "there was never a trust I formed between the (respondent) and BBMB with regard to the charge, and that "the respondent came onto the register, as

chargee of the land *via* a transfer from BBMB, according to the appellant, the transfer of the charge from BBMB to the respondent was obtained by means of an insufficient or void instrument. And it is this issue that should proceed for trial". In the opinion of the Court of Appeal, there were two strong grounds to impugn the charge, namely (a) "BBMB had no power to appoint the (appellant) as the security agent because such a power was vested in the guarantee facility (agreement) as stipulated in cl. 18(G) of the GFA"; and, (b) "the charge violated s. 433B of the NLC in that six of the guarantors under the GFA were foreign companies which failed to obtain the requisite approval of the state authority".

[10] The fact that the result in the charge action, with dismissal of the appeal, had reached its terminus, failed to impress the Court of Appeal who held (i) on the purported 'authority' of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 per Mohd Azmi FCJ, *United Malayan Banking Corporation Bhd v. Sykt Perumahan Luas Sdn Bhd* [1988] 2 CLJ 522; [1988] 3 MLJ 352b per Edgar Joseph Jr J, as he then was, *Harkness v. Bell's Asbestos And Engineering Ltd* [1967] 2 QB 729, 736 per Diplock LJ, *Eu Finance Berhad v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37 per Abdoolcader J, as he then was, delivering the judgment of the Federal Court, and *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77 per Gopal Sri Ram JCA, as he then was, delivering the judgment of the Federal Court, that the result in the charge action could be collaterally attacked, and, (ii) on the purported 'authority' of *Kandiah Peter Kandiah v. Public Bank Bhd* [1993] 4 CLJ 332; [1994] 1 MLJ 119 "that the order for sale was not a judgment or a decree, and that consequently, neither *res judicata* nor cause of action estoppel nor issue estoppel could be invoked against the respondent". But what had those latter cases, particularly *Badiaddin* and *Kandiah Peter*, in fact espoused?

[11] In *Hew Hooi Chun v. KL Teksi Radio Bhd* [2010] 4 CLJ 657; [2011] 3 MLJ 754, the Court of Appeal imparted the following commentary on *Badiaddin*, which we wholly adopt:

> In *Badiaddin*, the Federal Court 'dealt with the inherent jurisdiction of the court to set aside a final order' (*Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v. Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622, per Abdul Hamid Mohamad Chief Justice). The facts there were as follows. On

21 March 1988, the High Court granted a declaration that a piece of Malay reservation land (land) had been charged in contravention of the Malay Reservations Enactment (FMS Cap 142) ('the Enactment'). On 8 October 1990, the High Court declared that the appellants had received an advantage or benefit directly from the respondent, and ordered sale of the land to settle the loan. The appellants commenced proceedings afresh to have the 8 October 1990 order declared null and void on the ground that it contravened s. 13 of the Enactment. The appellants argued that they were entitled to the remedy *ex debito justitiae* without the need to comply with appeal procedure. The respondent argued that *res judicata* and estoppel precluded the appellants from questioning the validity of the 8 October 1990 order. The High Court held that it would be unjust to estop the appellants from challenging the 8 October 1990 order by reference to *res judicata* or any other branch of the doctrine of estoppel because the 8 October 1990 order was plainly invalid, it being made in contravention of an express provision of written law. The appeal to the Court of Appeal (see [1996] 3 MLJ 621) was allowed on the sole ground that the High Court was *functus officio* and had no jurisdiction to set aside the 8 October 1990 order irrespective of any illegality in the order. That decision was reversed by the Federal Court. Three judgments were delivered by Their Lordships. But it was the judgment of Mohd Azmi FCJ (Eusoff Chin CJ, and Wan Adnan FCJ, as he then was, concurring) that was the judgment of the Federal Court, where on the matter of inherent jurisdiction to set aside a final order, Mohd Azmi FCJ said as follows:

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank*'s case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make'.

The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'. Similarly in this country, the statement of Abdoolcader J (as he then was) in *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 at p 39 provides the correct guideline on the subject:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings, the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729 Lord Diplock LJ (now a Law Lord) said (at p. 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

In *Badiaddin*, the Federal Court settled that there is inherent and discretionary jurisdiction to set aside *ex debito justitiae* an order of court regularly obtained where there has been a breach of the rules of natural justice following the Privy Council case of *Isaacs v. Robertson* [1984] 3 All ER 140; [1985] AC 97. However, the Federal Court cautioned 'that in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction.

The contravention must be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction (in *MacQuire (Malaysia) Sdn Bhd v. HSBC Bank Malaysia Bhd & Anor and another appeal* [2007] 7 MLJ 139, *Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd (BSN Commercial Bank Malaysia Bhd & Ors, Interveners)* [2003] 1 MLJ 251), and *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & ors* [2000] 3 MLJ 699, the Court of Appeal applied *Badiaddin* per Mohd Azmi). In *Badiaddin*, the contravention defied a substantive statutory prohibition contained in the Malay Reservations Enactment. In *Meenakshi Naidoo v. Subramaniya Sastri* LR 14 1A 160 (cited by Gopal Sri Ram JCA, as he then was, in *Badiaddin*), the High Court at Madras purported to entertain an appeal which was not appealable. And in *Chief Kofi Forfie v Barima Kwabena Seifah* [1958] 1 All ER 289; [1958] AC 59 (also cited by Gopal Sri Ram JCA, as he then was, in *Badiaddin*), the judgment was delivered when the presiding judge of the Chief Commissioner's Court had no power to exercise judicial functions. There must be 'a breach of the rules of natural justice or a contravention of a statute which is a *sine qua non* to invoke the very limited jurisdiction of a court to have its orders declared as void' (*Annie Quah Lay Nah v. Syed Jafer Properties Sdn Bhd & Ors* [2007] 1 MLJ 225 per Gopal Sri Ram JCA). The order must be tainted by 'fraud or some other vitiating element and not a judgment that was merely irregular in the sense that it is one obtained in breach of a rule of court or of practice' (*Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd* [2003] 3 MLJ 321 per Gopal Sri Ram JCA).

[12] In *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673, the Federal Court per Abdull Hamid Embong FCJ, delivering the judgment of the court, held that *Badiaddin* should be read in the following context:

> It is settled law that the High Court cannot set aside a final judgment/order regularly obtained from another High Court unless the judgment was made in defiance of a substantive statutory prohibition which renders it null and void on the grounds of illegality or lack of jurisdiction. Only in that exceptional case can a defective judgment be struck out *ex debito justitiae*. It is thus only in this situation that a High Court may exercise its inherent jurisdiction to strike out a regularly obtained judgment of another court of concurrent jurisdiction. (see: *Badiaddin*'s case)
>
> ...
>
> We are thus in agreement with the appellant's stand that an earlier judgment can only be impeached when it is prohibited by statute; and that *Badiaddin* to us merely reaffirmed that rule and does not extend the inherent jurisdiction of the court to correct a perfected order or judgment beyond any statutory prohibition. This established rule was explained in *Tenaga Nasional* which we had earlier adverted to. In our view, that part of the holding of the Court of Appeal in *Selvam Holdings* should not be interpreted as giving the courts a broad power to set aside a previous perfected orders under the guise of "exceptional cases". We think that the *Badiaddin*'s phrase "to intervene and correct a serious defect in the order" should be read in the context of where an order was obtained in a manner which contravened a statute, resulting in that order being illegal or made outside the jurisdiction of the court. It is in this respect that the court's inherent jurisdiction may be exercised, to strike out an earlier order, *ex debito justitiae* and without the need for file a fresh suit.

[13] The inherent jurisdiction to set aside, *ex debito justitiae*, orders regularly obtained is settled. Unless the order is a nullity in the sense as enunciated in *Badiaddin*, it could not be attacked in collateral proceedings.

[14] The Court of Appeal held that there were two strong grounds to impugn the charge, namely (a) "BBMB had no power to appoint the (appellant) as the security agent because such a power was vested in the guarantee facility agent as stipulated in cl. 18(G) of the GFA"; and, (b) "the charge violated s. 433B of the NLC in that six of the guarantors under the GFA were foreign companies which failed to obtain the requisite approval of the state authority". But with respect, the action below was a collateral attack of an order for sale that was regularly obtained and against which the appeal was dismissed. For the collateral

attack, namely the instant action, to be maintained, let alone sustained, the critical particular was not whether there were grounds to impugn the charge but whether the order for sale was a contravention that defied a substantive statutory prohibition. But that critical particular was not present, not even arguably so, in the instant action. For even if it were true, the contravention of cl. 18(G) of the GFA was plainly not a contravention that defied a substantive statutory prohibition. In fact, the contravention of s. 433B(1)(e) of the NLC, was not even made out. Section 433B provides:

> (1) Notwithstanding anything contained in this Act or in any other written law:
>
> (a) a non-citizen or a foreign company may acquire land by way of a disposal under Division II;
>
> (b) a dealing under Division IV with respect to alienated land or an interest in alienated land may be effected in favour of a non-citizen or a foreign company;
>
> (c) alienated land, or any share or interest in such land, may be transferred or transmitted to, or vested in, or created in favour of any person or body as "trustee", or of two or more persons or bodies as "trustees", where the trustee or one of the trustees, or where the beneficiary or one of the beneficiaries, is a non-citizen or a foreign company;
>
> (d) the Registrar may in respect of any land register any person or body as "representative" or make a memorial in favour of any person or body as "representative" if such person or body is a non-citizen or a foreign company;
>
> (e) the Registrar may endorse any memorial of transmission on the register document of title to any land in favour of a non-citizen or foreign company,
>
> but only after the prior approval of the State Authority has been obtained upon an application in writing to the State Authority by such non-citizen or foreign company:
>
> Provided that no such approval shall be required in respect of:
>
> (aa) any land or any interest in land which is subject to the category "industry" or to any condition requiring its use for industrial purposes;

(ab) any dealing effected pursuant to a sale and purchase agreement for which an approval has been granted under section 433E and executed by the same parties in such agreement; and

(ac) any dealing or act with regard to alienated land or any interest in land exempted by rules made under paragraph (aa) of sub-section (1) of section 14.

And provided further that no such approval shall be required in respect of any dealing effected pursuant to a sale and purchase agreement for which an approval has been granted under section 433E and executed by the same parties in such agreement;

(2) Where the State Authority grants any approval under sub-section (1) it may be made subject to such terms and conditions as may be specified by the State Authority and to the payment of such levy as may be prescribed.

(2A) The State Authority may, where its approval under sub-section (1) is given subject to the payment of such levy as may be prescribed, remit to any non-citizen or foreign company, or exempt any non-citizen or foreign company from the payment of, any part of such levy:

Provided that the State Authority shall not remit to any non-citizen or foreign company, or exempt any non-citizen or foreign company from the payment of, such levy except in accordance with the directions of the National Land Council.

(3) Notwithstanding sub-section (1), but subject to sub-section (4), it shall not be necessary for a non-citizen or a foreign company to obtain the approval of the State Authority for the purpose of a charge or a lien in respect of any alienated land or any undivided share in such land or any lease of such land under Part Sixteen.

(4) Where an order for sale has been made under section 256, 263, or 281, as the case may be, a non-citizen or a foreign company, whether or not he is the chargee or a lienholder, shall not be entitled to bid at the sale where the land is subject to the category "agriculture" or "building" or to any condition requiring its use for any agriculture or building purpose, as the case may be, without the approval of the State Authority.

(5) Sub-section (4) shall not apply to land subject to the category "industry" or to any condition requiring its use for industrial purposes.

A (6) Sub-sections (3), (4) and (5) shall apply to any charge effected, or any lien created, whether before or after the commencement of this Part.

[15] Pursuant to s. 433B(1)(b) of the NLC, "a dealing under Division IV in alienated land may be effected in favour of a B non-citizen or a foreign company". Pursuant to s. 433B(1)(c), "alienated land, or any share or interest in such land, may be transferred or transmitted to, or vested in, or created in favour of any person or body as "trustee", or of two or more persons or bodies as "trustees", where the trustee or one of the trustees, or C where the beneficiary or one of the beneficiaries, is a non-citizen or a foreign company". And pursuant to s. 433B(1)(e) of the NLC, "the Registrar may endorse any memorial of transmission on the register document of title to any land in favour of a non-citizen or foreign company". Except that the prior approval of the state D authority must first be obtained upon an application in writing to the state authority by such non-citizen or foreign company.

[16] Nevertheless, there are exceptions to the requirement that the prior approval of the state authority must first be obtained. E Pursuant to s. 433B(1), "... no such approval shall be required in respect of (aa) any land or any interest in land which is subject to the category "industry" or to any condition requiring its use for industrial purposes; (ab) any dealing effected pursuant to a sale and purchase agreement for which an approval has been granted F under s. 433E and executed by the same parties in such agreement; and (ac) any dealing or act with regard to alienated land or any interest in land exempted by rules made under para. (aa) of sub-s. (1) of s. 14".

G **[17]** One other important exception is where the dealing is a land charge. Section 433B(3) of the NLC provides that "notwithstanding sub-s. (1), but subject to sub-s. (4), it shall not be necessary for a non-citizen or a foreign company to obtain the approval of the State Authority for the purpose of a charge or a H lien in respect of any alienated land or any undivided share in such land or any lease of such land under Part Sixteen". Hence, where the dealing is a land charge or lien, it shall not be necessary for a non-citizen or a foreign company to obtain the prior approval of the state authority for the registration and endorsement of the I charge. That too was the conclusion of the learned authors of *Land Law in Malaysia, Cases and Commentary* by Teo Keang Soo and Khaw Lake Tee 2nd edn. at p. 694, who thus commented on the restrictions under s. 433B of the National Land Code:

> The three categories of land use available under the National Land Code are 'agriculture, building and industry'. In the case of land subject to the category agriculture or building or to any condition requiring its use for any agricultural or building purpose, a disposal or dealing can be effected in favour of a non-citizen or foreign company only upon the prior written approval of the State Authority. However, this restriction does not apply for the purpose of effecting a charge or a *lien* in respect of such land or any undivided share therein or any lease thereof.
>
> (For further reading, see *Land Law in Malaysia, Cases and Commentary* by Teo Keang Soo and Khaw Lake Tee 3rd Edition at 1111)

[18] Prior written approval of the state authority is clearly not required where the dealing a land charge. Since it was not required, it could not therefore be contended that "the (instant) charge violated s. 433B ... in that six of the guarantors under the GFA were foreign companies which failed to obtain the requisite approval of the state authority". Really, in truth, the "two strong grounds to impugn the charge" only panned out to no more than an alleged breach of cl. 18(G) of the GFA, which, even if true, was not a contravention that defied an express statutory prohibition, which meant that the conditions of *Badiaddin* for a collateral action were not met and that the respondent was therefore barred by the doctrine of *res judicata* to bring the action below to attack the order for sale.

[19] The Court of Appeal yet held that the respondent was not barred by the doctrine of *res judicata* to bring a fresh action against the appellant:

> It is opportune to now refer to the Supreme Court case of *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77; [1997] 2 CLJ 36 which concerned an order for the sale of a charged land. Gopal Sri Ram JCA writing for the [Federal] Court had this to say (see the headnote at p. 37 of the report):
>
> > Proceedings under section 256 are not concerned with any contractual claims that the chargor may have against the chargee. They are concerned with the very narrow and limited question whether the chargor has adduced facts that establish cause to the contrary in the sense discussed herein. It follows that if the chargor is unable to sustain his opposition to the making of the order for sale *vide* a proceeding *in rem*, he may nevertheless sue the chargee *in personam* for breach upon the personal covenant or in

A equity. And it follows further that, notwithstanding that the order for sale herein had been properly granted, the appellant may still bring an action *in personam* for breach of contract against the respondent upon the first and second grounds of his complaints. It is not open to the respondent, in such an action, to plead issue estoppel or *res judicata*. This is because the Judge who makes the order does determine an issue or a cause for an estoppel to operate, and secondly, an order for sale made under section 256 National Land Code is not a judgment.

C It is pertinent to note that the judgment in *Low Lee Lian* referred to the decision of the Supreme Court in *Kandiah Peter v. Public Bank Bhd* [1994] 1 MLJ 119, a decision of Eusoff Chin SCJ, where His Lordship held that (see the headnote at p. 119 of the report):

D Held, allowing the appeal:

(1) A chargee who makes an application for an order for sale in foreclosure proceedings does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. In E order for the doctrines of *res judicata*, cause of action estoppel or issue estoppel to apply, the earlier proceedings must have resulted in a final judgment or decree. This requirement is not met by foreclosure proceedings which do not result or terminate in a final F judgment or decree.

(2) Where a chargor raises issues and relies upon facts to show 'cause to the contrary' in proceedings brought against him by the chargee, he is not barred from bringing a fresh action against the chargee G (notwithstanding that an order for sale has been made) and raising in that action the same or similar facts and issues as those raised by him in the foreclosure proceedings. Neither *res judicata* nor cause of action estoppel nor issue estoppel are available to the chargee to meet the chargor's action. H

(3) The trial judge was in error when he held that the appellant was estopped by *res judicata* from raising in the subsequent action the identical issues which he had raised in the foreclosure proceedings. The appeal was therefore allowed and a retrial of the action was ordered. I

[20] The Court of Appeal then closed the issue of *res judicata* in the following manner:

> We pause here for a moment. It is clear that the present appeal concerned reliefs pertaining to declarations which questioned the validity of the charge, the instrument and the memorial as invalid and ought to be set aside. It concerned an order that was a nullity. And an order which is a nullity can be challenged in a collateral proceeding. And the appellant is entitled to come to this court and ask that that order be set aside.
>
> With respect, the learned High Court Judge also erred in law and in fact when Her Ladyship held that the appellant was estopped from raising the same issue in the current suit as it is caught by the doctrine of *res judicata*. It is trite that the order for sale made under s. 256 of the NLC is not a judgment or a decree and, consequently, neither *res judicata* nor cause of action estoppel nor issue estoppel can be invoked in favour of the respondent to the detriment of the appellant. See *Kandiah Peter v. Public Bank Bhd.*
>
> The Latin phrase '*res judicata pro veritatem accipitur*' expresses the meaning of 'the need for decisions of the Court, unless set aside or quashed, to be accepted as incontrovertibly correct' (Honourable Justice KR Handley, '*Res Judicata*: *General Principles and Recent Developments*' [1999] 18(3) Aust Bar Rev 214). But, it must not be forgotten that *res judicata* only arises from a judgment obtained on the merits. And that no estoppel would arise from a final order which is not a judgment (*Maganja v. Arthur Trading As Shirley Arthur's Beauty Centre* [1984] 3 NSWLR 561 at p. 564). An interlocutory order (*Somodaj v. Australian Iron And Steel Limited* (1963) 109 CLR 285) and an order which requires further action before it is enforceable (*R v. Rogers* (No 2) (1992) 29 NSWLR 179 at p. 182) are not final orders. Likewise here, the order for sale made pursuant to s. 256 of the NLC is open to challenge by the appellant by way of a collateral proceeding as reflected in the current suit.

[21] *Kandiah Peter* and *Low Lee Lian* are often cited but also often misunderstood as to have held that the doctrine of *res judicata* has no application whatsoever in foreclosure proceedings.

[22] In *Kandiah Peter*, the facts were as follows. The chargor failed to set aside orders for sale of the charged lands. In his action brought to declare that the charge was null and void, the chargor raised and relied on facts and issues which the trial judge found to be identical to those raised by the chargor in the foreclosure proceedings. The trial judge dismissed the chargor's claim on the ground that the matter was covered by the doctrines of estoppel and *res judicata*. The Federal Court agreed with the trial judge that the issues raised by the chargor in the foreclosure

proceedings and in the fresh action were identical. The question before the Federal Court was whether the doctrines of issue estoppel or cause of action estoppel or *res judicata* were applicable in the circumstances to bar the chargor's fresh action. The Federal Court answered that "a chargee who makes an application for an order for sale in foreclosure proceedings under s. 256 of the Code does not commence an action", that foreclosure proceedings result not in a judgment or decree but in the grant or refusal of an order for sale, and that for the doctrines of *res judicata*, cause of action estoppel or issue estoppel to apply, the earlier proceedings must have resulted in a final judgment or decree.

[23] It should be noted that in *Kandiah Peter*, the issues and facts relied by the chargor in the fresh action had been raised by the chargor in the foreclosure proceedings. It was in that context that the Federal Court pronounced that the issues raised by a chargor in the foreclosure proceedings, to show 'cause to the contrary', could be raised by the chargor in a fresh action:

> In our judgment, where a chargor raises issues and relies upon facts to show 'cause to the contrary' in proceedings brought by the chargee under s. 256 of the Code, he is not barred from bringing a fresh action against the chargee (notwithstanding that an order for sale has been made) and raising in that action the same or similar facts and issues as those raised by him in the foreclosure proceedings. Neither *res judicata* nor cause of action estoppel nor issue estoppel are available answers to the chargee to meet the chargor's action.

[24] *Low Lee Lian* was not a fresh action but an appeal by the chargor against the order for sale, who argued that the bank had varied the rate of interest without giving any notice of the same to the appellant and that the bank had, without the chargor's knowledge, permitted the third party to breach the terms of the agreement between them. The main question that arose was whether they constituted, even if the complaints were made out, sufficient reason for the refusal of an order for sale by establishing 'cause to the contrary' under s. 256(3) of the National Land Code. The Federal Court per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court, took the opportunity to enunciate on 'cause to the contrary' and on the distinction between rights *in rem* and rights *in personam*. In relation the former, the Federal Court said:

In our judgment, 'cause to the contrary' within s. 256(3) may be established only in three categories of cases.

First, it may be taken as settled that a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s. 340 of the Code establishes cause to the contrary. That section provides as follows:

...

In other words, a chargor who is able to demonstrate that the charge, the enforcement of which is sought, is defeasible upon one or more of the grounds specified under sub-ss. (2) and (4)(b) above will be held to have established cause to the contrary under s. 256(3). The decision of Smith J in *Subchent Kaur v. Chai Sau Kian* [1958] MLJ 32, of the former Federal Court in *Phuman Singh v. Kho Kwang Choon* [1965] 2 MLJ 189, of Raja Azlan Shah J (as he then was) in *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 2 MLJ 124 and that of Edgar Joseph Jr J (as he then was) in *United Malayan Banking Corp Bhd v. Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352 (affirmed on appeal) sufficiently illustrate the proposition now under discussion.

Secondly, a chargor may show cause to the contrary within s 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary. So too, where the notice demands sums not lawfully due from the chargee. See *Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd* [1991] 2 MLJ 283. However, in such a case, it would be open to the chargee to subsequently serve a notice or a proper notice (as the case may be) before commencing proceedings afresh as the cause shown to the contrary does not in substance affect the chargee's right to apply for an order for sale.

Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity. This principle finds its origins in the judgment of Aitken J in *Murugappa Chettiar v. Letchumanan Chettiar* [1939] MLJ 296 at p. 298 where he said:

> I agree that equitable principles should not be invoked too freely for the purpose of construing our Land Code, but surely a chargor, who shows that there would be no need to sell his land if the chargee paid up in full what is due from himself in another capacity, has shown good and sufficient cause why the land should not be sold. Section

> 149 of the Land Code obviously contemplates that there may be cases in which charged land should not be sold, even though there has been a default in payment of the principal sum or interest thereon secured by the charge; and it seems to me that a chargor may 'shew cause' either in law or equity against an application for an order for sale, and that the courts should refuse to make an order in every case where it would be unjust to do so. By 'unjust' I mean contrary to those rules of the common law and equity which are in force in the Federated Malay States.

[25] Thus having imparted the pertinent law, the Federal Court then pronounced that an action brought to set aside a charge upon one or more of the grounds of defeasibility specified under s. 340 of the NLC is an action *in rem*:

> Digressing for a moment, it is to be emphasized that here, as in other areas of our land law, it is important to distinguish between rights *ad rem* and rights *in personam*. That the Code expressly preserves this distinction was recognized by so learned a judge as Raja Azlan Shah J (as he then was) in *Mercantile Bank Ltd v. The Official Assignee of the property of How Han Tek* [1969] 2 MLJ 196 at p. 198:
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> > The Official Assignee's view is not correct, *Vallipuram*'s case [*Vallipuram Sivaguru v. Palaniappa Chetty* [1937] MLJ 59] is against him. He forgets that independent of our land legislation our courts have always recognized equitable and contractual interests in land. See *Loke Yew v. Port Swettenham Rubber Co* [1913] AC 491. See also s. 206(3) of the National Land Code.
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> In the present context, *an action brought to set aside a charge upon one or more of the grounds of defeasibility specified under s. 340 of the Code is an action in rem*. For when it succeeds, the consequence is to set at naught the chargee's rights under the registered charge as against the whole world. On the other hand, a chargor who is able to demonstrate that the chargee is under a personal obligation that binds his conscience not to enforce the charge, though not in a position to bring his case within one or more of the exceptions to the indefeasibility provision may nevertheless proceed to enforce that obligation against the chargee. This is an action *in personam*. The consequences of succeeding in such an action will have the effect of getting the chargee to defeat his own title or of depriving him of some or all of his rights under the registered charge, including the right to obtain an order for sale. See *Oh Hiam & Ors v. Tham Kong* [1980] 2 MLJ 159. (emphasis added)

[26] *Low Lee Lian* concurred with *Kandiah Peter* that foreclosure proceedings result not in a judgment or decree and that "the making of an order for sale upon the failure of a chargor to satisfy the court that there existed cause to the contrary did not bar a subsequent action *in personam* brought by the chargor based upon the same facts that did not avail him in opposing the application under s. 256". *Low Lee Lian* also pronounced, and we wholly agree, that "an action brought to set aside a charge upon one or more of the grounds of defeasibility specified under s. 340 of the Code is an action *in rem*". Hence, the action below for a declaration "that the charge is not indefeasible within the meaning of s. 340(2) of the National Land Code, "that the charge is null and void", "that the charge, the instrument and the memorial are invalid", "that the charge, the instrument and the memorial be set aside", and, "that the order for sale dated 16 July 2007, the auction and other related orders in respect of the land made in the Kuala Lumpur High Court OS Proceedings (Suit No: S-24-2394-2005) be set aside", which attacked the indefeasibility of the charge, was not an action *in personam* but an action *in rem* and which could not be brought. *Kandiah Peter* pronounced that an action *in personam* could be brought, that is, if the action *in personam* is "based upon the same facts that did not avail (the chargor) in opposing the application under s. 256". But the present action was an action *in rem* that was based moreover on facts that were not raised in the foreclosure proceedings. Given so, *Kandiah Peter* could not apply, just as *Badiaddin* was wholly inapplicable.

[27] With respect, it was so plain and obvious that the instant action was barred by the doctrine of *res judicata*. Foreclosure proceedings result in the grant or refusal of an order for sale, and not in a judgment or decree. But an order for sale, once granted and unless set aside, is nonetheless a final order (see *Mui Bank Bhd v. Cheam Kim Yu* [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222, at p. 223; [1992] 2 MLJ 642, at p. 649; where it was held by the Federal Court that the order for sale, once drawn and perfected, was a final order). When the appeal against the instant order for sale was dismissed and there was no further appeal, the stage was reached where the instant order for sale had been fully adjudicated and therefore could not be re-litigated. The instant order for sale could be re-litigated if it were a contravention that defied a substantive statutory prohibition. But there was no such

A contravention as could have permitted the respondent to bring an action *in rem*, an action which raised only issues that should have been raised in the charge action. There was also no allegation that the order for sale was procured by fraud which could have permitted a fresh action. Under the doctrine of *res judicata*, the
B action below should have been struck out.

[28] For the above reasons, we answer the leave question in the affirmative and in the following terms: issues pertaining and/or relating to 'cause to the contrary' could only be raised in the
C charge action. A chargor is therefore barred from bringing a fresh action against a chargee, in order to raise issues which show a 'cause to the contrary', regardless of whether the chargor had or had not raised such issues at the stage of the chargee's application for an order for sale of the charged property under s. 256 of the
D National Land Code.

[29] We unanimously allow this appeal with costs, and reinstate all orders of the trial court.

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